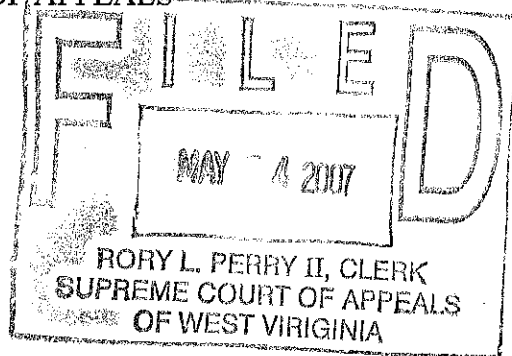


BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 33345



**EDWARD W. CANTLEY, SR. and
JUDITH K. CANTLEY, LISA BRAGG and
JAMES BRAGG, CHARLES FLOWERS,
TRACY FLOWERS, BETTY E. FLOWERS
LAURA GOFF, JAMES STOWERS, JOHN
CUMMINGS and AMANDA CUMMINGS, BRENDA
PRICE and RICKY A. PRICE, EARL SOWARDS
and MAVIS SOWARDS, LISA ADKINS and
TOMMY ADKINS, and JENNIFER
LAWRENCE, Individually
and on Behalf of All Others Similarly Situated**

Plaintiffs and Putative Class Representatives,

v.

LINCOLN COUNTY COMMISSION,

Defendants.

Appeal from the Circuit Court of Lincoln County, West Virginia

APPELLANTS' BRIEF

Rudolph L. DiTrapano (W.Va. I.D. No. 1024)
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Table of Contents

I	Kind of proceeding and nature of ruling below	1
II	Statement of facts	4
III	Issue presented	7
IV	Standard	7
V	Argument	8
VI	Conclusion	14

Table of Authorities

West Virginia cases

<i>Carden v. Nicholas County Court</i> , 110 W. Va. 195, 157 S.E. 411 (1931)	10
<i>Click v. Click</i> , 98 W. Va. 419, 127 S.E. 194 (1925)	12
<i>In re Application of Dailey</i> , 465 S.E. 2d 601 (W. Va. 1995)	3
<i>Lipscomb v. Tucky County Commission</i> , 197 W. Va. 84, 475, S.E. 2d 84 (1996)	7
<i>Murphy v. Smallridge</i> , 196 W. Va. 35, 468 S.E. 2d 167 (1996)	7
<i>Stephen L.H. v. Shelly L.H.</i> , 195 W. Va. 384, 465 S.E. 2d 841 (1995)	11, 12
<i>West v. City of Clarksburg</i> , 123 W. Va. 22, 13 S.E. 2d 155 (1941)	12

Other Jurisdictions Cases

<i>Mistretta v. U.S.</i> , 488 U.S. 361 (1989)	3
<i>National Wildlife Federation v. Cleveland Cliffs Iron Co.</i> , 684 N.W. 2d 800, 806 (Mich. 2004)	3
<i>Puckett v. Sellars</i> , 235 N.C. 264, 69 S.E. 2d 497 (1952)	12
<i>Schwanda v. Bonney</i> , 418 A. 2d 163 (Me. 1980)	12

Statutes

W. Va. Code § 7-1-3u	1, 2, 8, 9
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W. Va. Code § 7-1-3v	8
W. Va. Code § 7-1-3kk	10
W. Va. Code § 19-21-1	10

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Plaintiffs and Putative Class Representatives,

v.

LINCOLN COUNTY COMMISSION,

Defendants.

Appeal from the Circuit Court of Lincoln County, West Virginia

APPELLANTS' BRIEF

I. Kind of Proceeding and Nature of Ruling Below

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

The Legislature has mandated that county commissions are responsible for protecting the public from floods and the conditions of streams and rivers which may contribute to floods. Specifically, W.Va.Code § 7-1-3u, provides:

To protect people and property from floods, counties and municipalities are hereby empowered to rechannel and dredge streams; remove accumulated debris, snags, sandbars, rocks and any other kinds of obstructions from streams; straighten stream channels; and carry out erosion and sedimentation control measures and programs.

In November of 2003, after years of neglect by Defendant Lincoln County Commission, the homes and properties of residents of Yawkey-Griffithsville, West Virginia, once again were severely damaged from the rise of flood waters from the Mud River. In an effort to hold Defendant Commission responsible for its statutory duties, residents of Yawkey-Griffithsville, West Virginia brought this action on or about November 11, 2004, to recover for the damages caused, and likely to be caused, by the negligent upkeep of the Mud River. Due to various considerations, including the number of putative Plaintiffs, as well as the commonality of the claims brought against Defendant, Plaintiffs filed a class action Complaint.

In the complaint, Plaintiffs provided a detailed summary, based upon freedom of information requests and documents obtained from the United States Army Corps of Engineers, revealing the many warnings by the Corps that the failure to maintain the Mud River and to clear it of sandbars and accumulated debris would increase the flooding danger in the surrounding area. The complaint alleged that despite these warnings, Defendant Commission failed to carry out its statutory obligation to protect the public from flooding.

On or about March 16, 2006, Defendant Commission filed a Motion to Dismiss, arguing that once the Middle Fork Drainage Levee and Reclamation District (hereinafter "Drainage District") was formed in November, 1965, Defendant Commission no longer had any responsibility for the upkeep

and maintenance of the Mud River.¹ Plaintiffs filed their opposition to said motion on or about May 12, 2006. In their response Plaintiffs informed the Court that although the Drainage District had been formed to implement flood controls, nothing in the statute, or the court order creating the Drainage District shielded Defendant Commission from negligent maintenance and upkeep of the Mud River. Furthermore, based upon information obtained from the West Virginia Secretary of State's web page, the Drainage District ceased to exist several years ago.² Nonetheless, Plaintiffs asserted that even when the Drainage District existed, Defendant Commission still had the responsibility to protect the public from floods.

¹ The Drainage District was created pursuant to W.Va.Code §19-21-1, whereby circuit courts are conferred with the power and authority to create drainage, levee and reclamation districts. Furthermore, the circuit courts are given the power and authority to provide ways and means for the organization, operation and maintenance of said drainage, levee and reclamation districts. *Id.* Pursuant to this statutory authority, the Lincoln County Circuit Court created the Middle Fork Drainage, Levee and Reclamation District of Lincoln County in the Duval District in 1965. The constitutionality of the legislature delegating to the judicial branch the authority to create a drainage district given the separation of powers principle and the non-delegable duty doctrine are not now before the Court. *See*, Syllabus Points 4, 5 *In re Application of Dailey*, 465 S.E. 2d 601 (W. Va. 1995)(In holding that the judicial branch cannot be given the authority to issue licenses to carry concealed deadly weapons when such is the province of the legislature, this Court stated, "the Legislature cannot commit to the judiciary powers which are primarily legislative. The Legislature cannot impose upon any court a duty which requires the performance of an act not judicial in character"); *Mistretta v. U.S.*, 488 U.S. 361 (1989)("consistent with the separation of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary"); *National Wildlife Federation v. Cleveland Cliffs Iron Co.*, 684 N.W. 2d 800, 806 (Mich. 2004)(it is traditionally the province of the judicial branch to decide private disputes between persons, and the province of the legislature to regulate public concern). The present case is particularly troublesome in terms of separation of powers principles as the legislature has given the judiciary the power to create drainage districts with the power and authority to tax citizens. Taxation is a power delegated exclusively to the legislature by the West Virginia Constitution.

² Indeed, Plaintiffs did not bring suit against the District originally because it was believed to be nonexistent.

By order entered August 28, 2006, the Honorable Judge Jay M. Hoke granted Defendant Commission's motion to dismiss, but permitted Plaintiffs to amend their complaint to add the Drainage District as a Defendant in this matter.³ Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the dismissal order was made immediately appealable. This appeal is filed from this dismissal order.

II. Statement of the Facts

Residents of West Virginia are all too familiar with the devastation caused by floods. For generations, the residents of the Yawkey-Griffithsville area in Lincoln County, West Virginia have helplessly watched as silt, sand bars, debris and brush have accumulated in the Middle Fork of the Mud River. There is a long history showing that Defendant Commission did little if anything to mitigate the danger of flooding caused by this negligent upkeep. Complaint at ¶¶29 through 41. Already in 1962, Defendant Commission knew of the propensity for the Mud River to flood, and, together with the Corps of Engineers, created the Middle Fork Flood Control Project. Complaint at ¶21.

One of the terms proposed to Defendant Commission as a condition of the Corps' actions was that "after completion of the works project, that the same will be maintained and operated in accordance with regulations prescribed by the Secretary of the Army." *Id.* In an order dated November 8, 1962, Defendant Commission gave its assurances that local bodies would indeed continue to perform upkeep in the project area once the Corps was finished. *Id.*

³As mentioned by Plaintiffs' counsel during the motion docket discussion with the Court, Plaintiffs attempted to serve the Drainage District through the Secretary of State's office. However, counsel for Plaintiffs were notified that such service could not be made. Plaintiffs are not aware if any individual members of the Drainage District are still alive and Plaintiffs have never been able to find any office or other physical location for the Drainage District.

During 1963, and 1964, a detailed project report for the channel improvement project was prepared and revised by the Corps outlining the plan proposed for the protection of the Griffithsville-Yawkey area from Middle Fork floods. *Id.* at ¶22. Again, in a letter dated November 27, 1964, the Corps stressed the importance of local governing bodies to participate in the upkeep of the project by preventing brush and tree growth within the project, clearing lines, removing deposits and debris, and repairing seeded and/or riprapped portions of the channel which had begun to sluff. *Id.* at ¶23. As a part of the maintenance instructions, it was stated that the project should be inspected at 90-day intervals. *Id.* at ¶24. If unsatisfactory conditions were found, they were to be promptly corrected to assure proper operation of the project and reductions in flood heights. *Id.* Despite numerous warnings outlining the importance of proper upkeep, the Mud River was improperly maintained since the beginning of the project. *Id.* at ¶46.

In 1965, the Middle Fork Drainage District was formed. Ex. C to Defendant's Motion to Dismiss. However, it too failed to maintain the Mud River properly. Plaintiffs' Brief in Opposition to Defendants Lincoln County Commission's Motion to Dismiss, p. 6. In a report dated September 9, 1969, an engineer for the Corps, John Schneider, wrote that the project had not had any maintenance since its completion. Complaint at ¶29.

The following year, the Corps warned that sandbars were beginning to form in the channel. *Id.* at ¶30. Instead of acting to rectify the problem, the sandbars were allowed to remain, and by letter after the 1971 inspection, the Corps expressed that it was imperative that sand and gravel bars, which had formed at various locations in the channel be removed to insure the integrity of the project. *Id.* at ¶31. The project was inspected on an annual basis, and the Corps noted first the

presence of sand bars, and then the presence of additional accumulated debris was referenced.⁴ As early as 1976, the Corps was warning that flooding could occur, and that the probability of this happening corresponded with the growth of the sand bars. *Id.* at ¶35.

After the 1980 inspection, the Corps found that several sand and gravel bars throughout the project continued to grow. *Id.* at ¶40. The problem was compounded by brush and weeds which had become established on the bars. *Id.* Further exasperating the problem was the fact that a saw mill had been allowed to encroach on the channel. *Id.*

Despite the growing danger of floods, the situation continued to deteriorate. Again, after another year had passed, the Corps performed another inspection. The findings, unfortunately, were consistent with years past. The sand and gravel bars continued to grow, and weeds and brush had still not been removed, further accelerating the problem. *Id.* at 41. Again the Corps warned that the danger of flooding was continuing to grow, and that liability resulting from flood damage could be significantly greater. *Id.* In an effort to stress the importance of proper maintenance, the Corps reports that sand bars need to be removed as soon as possible. *Id.*

In or around 1996, two one-lane bridges located at Stowers Lane and Sugar Tree Creek Road were replaced with modern, two way bridges. *Id.* at ¶42. The construction of these bridges caused silt, dirt and debris to enter the river and further caused the already enlarged and growth-covered sand bars to grow at an accelerated rate. *Id.*

The following year, in an attempt to alleviate some flooding from hillside runoff of the properties across the highway from the river, the State of West Virginia installed new drainage pipes

⁴Due to the number of warnings issued by the Corps, Plaintiffs will not list each such correspondence. Rather, it is Plaintiffs' wish to give the Court an overview of the negligent maintenance giving rise to the flooding on Plaintiffs' properties.

under the roadway to direct the runoff and backwater into the river. *Id.* at ¶43. However, with the large sandbars, brush and debris that had been allowed to accumulate in the Mud River, the flooding was accentuated instead of alleviated. *Id.*

Over the course of the forty-one years following the creation of the Middle Fork Flood Control Project, the Corps sent numerous letters warning of the risk of flooding due to large sandbars, brush and debris which had been allowed to accumulate in the Mud River. Still, the problems persisted, and on or about November 12, 2003, the residents of Yawkey and Griffithsville suffered extensive flooding when the Middle Fork of the Mud River overflowed its banks due to the sand bars, brush and debris that were obstructing the flow of the river. *Id.* at ¶44. After the putative class members had expended copious amounts of time and expensive cleaning their property after the severe flood, the Mud River again overflowed its banks, again flooding the residents only a week later, on or about November 19, 2003. *Id.* at ¶45.

III. Issue Presented

Whether the trial court erred in granting Defendant's motion to dismiss where: (1) Multiple questions of fact remain rendering a dismissal order inappropriate; (2) The Legislature had bestowed on Defendant Commission the power to prevent flooding, to prevent their citizens from suffering damages caused by floods, and to provide for the elimination of hazards to public health and safety subsequent to the creation of the Drainage District and the Drainage District had abandoned its responsibilities to prevent flooding; and (3) The statutes granting authority to Defendant Commission should be construed as a mandate rather than merely permissive?

IV. Standard of Review

In reviewing a circuit court's order granting a motion to dismiss, this Court will apply a *de novo* standard. Syllabus Point 1, *Lipscomb v. Tucky County Commission*, 197 W.Va. 84, 475 S.E.2d

84 (1996). Generally, a motion to dismiss should only be granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Murphy v. Smallridge*, 196 W.Va. 35, 37, 468 S.E. 2d 167, 168 (1996). With this standard in mind, Plaintiffs respectfully submit it is clear that the lower court erred in granting Defendant Commission's motion to dismiss.

V. *Argument*

The trial court erred in granting Defendant's motion to dismiss because: (1) Multiple questions of fact remain rendering a dismissal order inappropriate; (2) The Legislature had bestowed on Defendant Commission the power to prevent flooding, to prevent their citizens from suffering damages caused by floods, and to provide for the elimination of hazards to public health and safety subsequent to the creation of the Drainage District and the Drainage District had abandoned its responsibilities to prevent flooding; and (3) The statutes granting authority to Defendant Commission should be construed as a mandate rather than merely permissive.

As Defendant Commission was dismissed from this matter through a motion to dismiss, Plaintiffs were not given the opportunity to conduct discovery into any of the factual issues alleged in the complaint. For example, the interrelationship between Defendant Commission and the Drainage District will need to be developed. Obviously, the multiple allegations in the complaint raise serious issues regarding what actions, if any, Defendant Commission took to carry out its statutory obligations under W.Va.Code §7-1-3u. Discovery also will reveal what federal, state or other funds have been received by Defendant Commission through the years to maintain the Mud River.⁵

⁵An internet search reveals that Defendant Commission received a \$1 million grant under the U.S. Environmental Protection Agency's National Decentralized Wastewater Demonstration program for a clean up project in the Mud River. Plaintiffs have not been able to conduct discovery to see if this and similar programs incorporate flood control measures.

Defendant Commission also is obligated to comply with the National Flood Insurance Act.⁶ Plaintiffs have not been given an opportunity to conduct discovery to determine if there is any correlation between Defendant Commission's activities in that capacity, and maintenance of the Mud River to prevent flooding.⁷ As factual issues remain, it was error for the lower court to grant Defendant Commissioner's motion to dismiss.

Notwithstanding the fact that Plaintiffs were not given an opportunity to conduct discovery into the various factual issues remaining, not only did the lower court grant Defendant Commission's motion to dismiss, but it also made various factual findings in its Order which had neither been raised in Plaintiffs' Complaint, or addressed in discovery. For instance, the lower court found "the Lincoln County Commission has never assumed control of the Middle Fork Drainage District but, to the contrary, has avoided interaction with that Drainage District." Judge Hoke appeared to be speaking from his own personal observations as a resident of Lincoln County and former prosecuting attorney. However, Plaintiffs never had any opportunity to conduct any discovery into the interaction between Defendant Commission and the Drainage District. Accordingly, it was error for the lower court to make this factual finding in an Order on a motion to dismiss.⁸

In recognition of the danger presented by flooding in West Virginia, the Legislature has enacted several statutes conferring authority on county commissions to take actions to prevent

⁶ W.Va.Code §7-1-3v.

⁷ Plaintiffs do not intend for this to be an exhaustive list of the factual questions which remain.

⁸ The lower court also noted that it was aware of prior controversies between the Drainage District and the citizens of Lincoln County regarding the Drainage District's taxing authority. Again, the lower court erred in this consideration as Plaintiffs' Complaint does not make such allegations, and no discovery was had into that issue.

flooding. Specifically, W.Va.Code §7-1-3u, provides:

To protect people and property from floods, counties and municipalities are hereby empowered to rechannel and dredge streams; remove accumulated debris, snags, sandbars, rocks and any other kinds of obstructions from streams; straighten stream channels; and carry out erosion and sedimentation control measures and programs.⁹

The Code further provides, in order to protect their citizens, Commissions may “accept any and all . . . services and assistance which may be available from the federal and state government or any private source.” *Id.* By the clear language of this statute, it is clear that the Legislature did not intend for Defendant Commission to act alone in this endeavor or restrict it in any way from receiving services from other entities. Clearly cooperation between Defendant Commission and other entities was specifically contemplated in enacting this statute. Significantly, despite the trial court’s conclusion to the contrary, nothing in the statute provides that, upon creation of a drainage district, county commissions are no longer empowered to implement flood controls or are no longer liable for failure to implement flood controls.

The Legislature also conferred upon county commissions the power to:

issue orders and take other appropriate and necessary actions for the elimination of hazards to public health and safety and to abate or cause to be abated anything which the commission determines to be a public nuisance. W. Va. Code § 7-1-3kk.

Clearly, Defendant Commission is empowered with the authority to dredge or otherwise maintain the Middle Fork of the Mud River from flooding its banks and harming the citizens of Lincoln County. Despite this authority, and despite the fact that the Drainage District performed little, if any, of its maintenance obligations as chronicled *supra*, Defendant Commission sat idly by

⁹ Chapter 7 Article 1 is entitled “County Commissions Generally.”

and watched the Mud River become congested to such a point that flooding to nearby residents was only a matter of time. Indeed, historically, county commissions have been held liable for flood damage arising from construction projects that resulted in water damage to adjacent property. *Carden v. Nicholas County Court*, W.Va. , 157 S.E. 411 (1931)(County court liable for flood damage to property where the state road commission had altered the natural flow of a stream in constructing a road).

Defendant Commission asserted, and the lower court agreed that with the creation of the Middle Fork Drainage District, Defendant Commission no longer had any authority to maintain the Mud River. This assertion is clearly erroneous given the fact that the statute giving county commissions the authority to treat streams to prevent floods was passed in 1975, ten years after the Drainage District was formed, and the statute giving county commissions the power to eliminate hazards to public health and safety was passed in 2002, thirty-seven years after creation of the Drainage District.

In its Order, the lower court stated:

The Court further finds that the Lincoln County Commission has never assumed control of the Middle Fork Drainage District, but, to the contrary, has avoided interaction with that Drainage District and the County Commission is without legal authority either statutory or common law to abolish or restrict that Drainage District . . . The Court concludes that the Lincoln County Commission is without jurisdiction or authority upon the Middle Fork of the Mud River as the exclusive jurisdiction and authority of and upon the Middle Fork of the Mud River rests with the Middle Fork Drainage, Levee and Reclamation District of Lincoln County.

There is simply no support for the lower court's opinion that Defendant Commission has no authority for upkeep of the Mud River. Nothing in the statutes conferring power on Defendant

Commission to treat streams and eliminate public nuisances provides that commissions are striped of authority or jurisdiction upon creating of a drainage district. Indeed, the Legislature has specifically empowered county commissions to accept aid in this endeavor from other entities. Nothing in the statutes provides immunity to county commissions once a drainage district has been created, and nothing in the statutes provides that a county commission's duties are discharged upon creation of a drainage district.

As noted, each of these statutes was passed into law after the Drainage District was created. Had it been the Legislature's intent for the establishment of the Drainage District to strip Defendant Commission of any authority or accountability in the maintenance and upkeep of streams and rivers it would make little sense to pass this subsequent legislation. "When the legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch." Syllabus Point 2, *Stephen L.H. v. Shelly L.H.*, 195 W.Va. 384, 465 S.E. 2d 841 (1995). Accordingly, it is presumed that the Legislature knew of the judicial decision to create the Drainage District when passing the statutes granting to Defendant Commission the power to perform maintenance in the Mud River. If it was the Legislature's intent for creation of a Drainage District to strip Defendant Commission of any authority or accountability it would be completely unreasonable to pass this legislation. Courts are cautioned against construing statutes to lead to absurd results. Syllabus Point 2, *Click v. Click*, 98 W.Va. 419, 127 S.E. 194 (1925). By the clear language of the statutes, Defendant Commission was given the authority to maintain the Mud River, and the creation of a Drainage District did not relieve Defendant Commission from its duty to protect its residents by implementing flood maintenance.

Finally, it has long been a principle of statutory construction that permissive statutes will be

construed as creating a mandatory duty when public interests or public safety are at stake.¹⁰ Public interest is unquestionably at issue in legislation designed to prevent homes and residences from floods.¹¹ As a result, Defendant Commission was obligated to act to prevent Plaintiffs from suffering flood damages, especially since the Drainage District has certainly done little if anything, and, in fact, it appears to have had its license revoked.

The lower court ruled that since the legislative enactments in W.Va.Code §7-1-3 *et. seq.* are permissive rather than mandatory, then the Middle Fork Drainage District has “exclusive jurisdiction, to the exclusion of the Lincoln County Commission.” Initially, such an interpretation would render the adoption of the above statutes nonsensical. Furthermore, there is simply nothing in the statutes which would prevent Defendant Commission from performing its duties, or from discharging its duties upon creation of a Drainage District. In fact, as the statutes address public interests, they create a mandatory duty on Defendant Commission.

¹⁰ See, Syllabus Point 1, *West v. City of Clarksburg*, 123 W. Va. 22, 13 S.E. 2d 155 (1941)(statutes addressing public interests are construed as mandatory even if drafted with permissive language); *Id.* at 157 (“If the public interest or private rights call for the exercise of the power vested in a public official, the language used, though permissive or directory in form, is in fact peremptory or mandatory, as a general rule . . . Especially is this so when there is nothing in the act, save the permissive form of expression, to denote that the legislature designed to lodge a discretionary power merely . . . Where a statute . . . clothes a public body or officer with power to do an act which concerns the public interests or the rights of individuals, though the language of the statute be permissive merely, it will be construed as imperative, and the execution of the power may be insisted upon as a duty.”)(internal citations omitted); *Schwanda v. Bonney*, 418 A.2d 163, 167 (Me. 1980)(“it is an accepted principle of statutory construction that, when the word ‘may’ is used in imposing a public duty upon public officials in the doing of something for the sake of the public good, and the public or third persons have an interest in the exercise of the power, then the word ‘may’ will be read ‘shall,’ the exercise of the power being deemed imperative by legislative intendment.”); *Puckett v. Sellars*, 235 N.C. 264, 268, 69 S.E.2d 497, 500 (1952).

¹¹ Indeed one of the statutes granting this power is entitled “Authority of counties and municipalities to treat streams to prevent floods” and another entitled “Authority to provide for the elimination of hazards to public health and safety; penalty.”

VI. Conclusion

For all the foregoing reasons, Plaintiffs respectfully ask the Court to grant **PLAINTIFFS' APPEAL**, to schedule this appeal on the argument docket, to reverse the order of Judge Hoke granting Defendant Commission's Motion to Dismiss, and to remand this case to the trial court for jury consideration.

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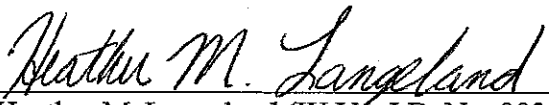
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CERTIFICATE OF SERVICE

I, Heather M. Langeland, do hereby certify that a copy of the foregoing **PLAINTIFFS' APPEAL BRIEF** was served on counsel of record on the 4th day of May, 2007, through the United States Postal Service, postage prepaid, to the following:

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